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No. 92-1554

In The

Supreme Court of the United States

October Term, 1992

CAROL JESSEN HINTZ, ET AL.,

Petitioner,

vs.

PARK COUNTY, MONTANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a presumption against suicide in federal civil cases creating a genuine issue of fact as to whether John Hintz shot himself, and precluding summary judgment?

2. Was John Hintz, at the time he shot himself, in custody, justifying the imposition of liability under Section 1983 and the Due Process Clause of the Fourteenth Amendment for gross negligence in failing to prevent his suicide?

3. May a federal district court dismiss pendent state law claims remaining after all federal claims have been dismissed?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. Petitioner Misstates Facts Critical To This Court's Consideration Of The Petition 7

II. Certiorari Should Not Be Granted Because The Ninth Circuit Has Not Decided A Federal Question In Conflict With This Court's Precedent 9

III. The Lower Court Did Not Err In Granting Summary Judgment For Defendants On Petitioner's Section 1983 Claim 11

A. There Is No Presumption Against Suicide Constituting Affirmative Evidence In Federal Civil Actions 12

B. A Passenger In A Moving Vehicle With An Avenue Of Escape Is Not In The Custody Of Law Enforcement Officers, For The Purpose Of Imposing Liability On The Officers For Failing To Prevent His Suicide .. 14

IV. The District Court's Grant Of Summary Judgment Was Not Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision 16

V. The Appellate Court Properly Affirmed The District Court's Denial Of Petitioner's Pendent State Claims 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986) 9

Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979) 11

Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984) 15

California v Beheller, 463 U.S. 1121, 77 L.Ed.2d 1275, 103 S.Ct. 3517 (1983) 15

Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986) 9

Daniels v. Williams, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) 11, 12

DeShaney v. Winnebago County Social Services Department, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989) 14

Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959) 10, 12, 13

Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1989) 14

Oklahoma City v. Tuttle, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) 11

Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) 11

Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986) 14

United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966) 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND RULES

Amendment XIV, Federal Constitution..... *passim*

Rule 56(c), Fed.R.Civ.P. 9

Rule 10(a), Rev. Rules, S.Ct..... 7, 16

Rule 10(c), Rev. Rules, S.Ct..... 6, 9

42 U.S.C. 1983, *et seq*..... *passim*

TEXTUAL AUTHORITIES

Black's Law Dictionary, p. 347 (5th Ed. 1979)..... 15

Webster's New Collegiate Dictionary, p. 280 (1973)..... 15

STATEMENT OF THE CASE

John Hintz, a chronic alcoholic, became threatening and abusive toward his wife Carol, who had filed for divorce. (Deposition of Carol Jessen, pp. 26, 30-31.) In July, 1986, at Carol's urgent request, a temporary restraining order and a contempt warrant naming John Hintz were issued by the Park County Justice of the Peace. (Affidavit of Park County Justice of the Peace Deanna Egeland, attached to Defendants' Brief in Support of Motion for Summary Judgment.) Carol made arrangements to meet the deputies at her house and let them in as John had hidden from the officers earlier in the day. (Deposition of Brad Wilson, Exhibit 1.)

On the way to the scene, two Livingston deputies encountered the Clyde Park deputy. When the three arrived at the house to serve the arrest warrant and temporary restraining order, Carol advised the deputies that John, who had been drinking, had just left with Wade Sarrazin. She gave them a description of Sarrazin's truck and advised them of John's probable destination. (Deposition of Brad Wilson, pp. 14-15, Deposition of Carol Jessen, p. 40.) Earlier that evening John Hintz showed Sarrazin a sawed-off .410 shotgun Hintz had made. Hintz took that weapon and two .410 shells with him when he and Sarrazin went to buy beer that evening. (Deposition of Wade Sarrazin, Exhibit 1, p. 2.)

Shortly after 10:00 P.M., one deputy located the Sarrazin vehicle and followed it while two deputies in another car parked on the road leading to the Hintz residence. The deputies' car blocked about half of the

roadway. (Deposition of Brad Wilson, pp. 14-17; Deposition of Lee Roy Keto, pp. 11-14; Deposition of Hank Tashjian, p. 12.) When Hintz noticed that the Sarrazin vehicle was being followed by a law enforcement officer, he reached up and removed the sawed-off .410 shotgun from the gun rack in the truck. (Deposition of Wade Sarrazin, Exhibit 1, pp. 1-4.) When Sarrazin turned onto the road leading to the residence, deputies in both vehicles turned on their revolving lights. (Deposition of Brad Wilson, p. 18; Deposition of Lee Roy Keto, p. 15; Deposition of Hank Tashjian, pp. 12-13.) Deputies Wilson and Keto heard the shot, and Wilson saw the flash of the gun firing inside the truck. (Deposition of Lee Roy Keto, pp. 18-21; Deposition of Brad Wilson, pp. 21-25.) Immediately after the shot and before the truck stopped, the shotgun came out of Hintz's window. (Deposition of Hank Tashjian, pp. 15-16.) Sarrazin then stopped the truck and Hintz opened his door and collapsed upon the road. When Wilson approached Hintz, the latter was already lying or crouching on the ground, wounded. (Deposition of Hank Tashjian, pp. 17-19.) First the deputies and then arriving medical personnel administered first aid to Hintz. Hintz was transported to the Livingston Memorial Hospital, where he was pronounced dead at 11:43 P.M. (Deposition of Brad Wilson, pp. 30-35.)

Undersheriff Frawley recovered the sawed-off .410 shotgun, one .410 shell, and one used .410 shell casing from the scene. (Deposition of Dennis Frawley, p. 26.) That evening, Undersheriff Frawley took a statement from Wade Sarrazin. In that statement, Wade testified Hintz shot himself with a sawed-off .410 while the vehicle was still moving:

[Sarrazin]: And I said well do you want me to turn or just keep goin, he said turn I said there is another cop car there on the right then the lights come on.

[Frawley]: What lights?

[Sarrazin]: The other police car lights.

[Frawley]: Okay.

[Sarrazin]: And then he said ah – he said he, well then he said speed up again so I speeded a little again, so then when I started slowin down to turn I said shit there's another cop there and then he said, he said "goodbye John," he said "goodbye, Wade. I love you," and that's the last, then he shot it.

. . .

[Frawley]: Okay. Ah he shot himself? Ah how did it have [sic], were you stopped or what?

[Sarrazin]: No, we weren't stopped. I didn't even know he had the, I knew he had the gun but I didn't, he just said goodbye John, goodbye Wade, and then bang.

[Frawley]: Okay and this happened while the vehicle was still moving?

[Sarrazin]: Yes.

. . .

[Frawley]: Okay. Did you see the officers at any time fire their weapons or do anything like that?

[Sarrazin]: *No, the officers never fired their weapons*. [Emphasis supplied.]

. . .

[Frawley]: Ah, let's run through that shooting part a little bit. Ah, he shot himself while the vehicle was still moving, correct?

[Sarrazin]: Yes.

[Frawley]: He shot himself in the vehicle?

[Sarrazin]: Yes.

[Frawley]: And did you see where he shot himself?

[Sarrazin]: No, I didn't even know he, I just heard the shot and then I see, I looked over and he had the gun just like this.

[Frawley]: Well describe what you were showing to me.

[Sarrazin]: He had one hand on the trigger and one hand on the lower part of the barrel.

[Frawley]: And where was the gun pointing?

[Sarrazin]: At, looked like right at his chest, I couldn't really see and

[Frawley]: You saw that right after the gun shot?

[Sarrazin]: I saw that, I saw that be, I didn't really, before the gunshot.

[Frawley]: Okay, you kinda just glanced over at him and saw this?

[Sarrazin]: Yeah I just kinda glanced over and then bang and he just

[Frawley]: Okay. What happened to the shotgun after the shooting? Do you

> [Sarrazin]: I don't have any idea.
>
> [Frawley]: You don't have any idea. Was his window rolled down?
>
> [Sarrazin]: Ah, it was open about, oh probably eight, ten inches. (Deposition, Exhibit 1, Wade Sarrazin, pp. 4-5.)

In his deposition taken on June 7, 1990, Sarrazin stated:

> Q. Okay. But there is no doubt in your mind that he did shoot himself?
>
> A. No.
>
> Q. And you saw it?
>
> A. Yeah. (Deposition of Wade Sarrazin, p. 7.)

Petitioner claims that the death of John Hintz was caused by the policies of Park County, Montana, and the conduct of Robert Oakland, Dennis Frawley, Lee Roy Keto, Brad Wilson, and Hank Tashjian. Petitioner brought this action for alleged deprivations of John Hintz's civil rights in violation of the Federal Constitution and 42 U.S.C. 1983, *et seq*. She also alleged claims under Montana law for assault and battery, intentional infliction of emotional distress, and negligence.

Defendants moved for summary judgment arguing that the facts showed that Hintz committed suicide, and that Hintz was not in the custody of the Park County Sheriff's deputies when he committed suicide. The district court granted the defendants' motion for summary judgment. The Court issued a Memorandum and Order and judgment was entered. Hintz filed a Motion to Reconsider. The district court heard oral argument on the Motion to Reconsider and denied the same.

Hintz filed a notice of appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit heard oral argument on September 18, 1992, and issued its order affirming the district court. Hintz's Petition for Rehearing was denied.

SUMMARY OF ARGUMENT

The petitioner has misstated the single most determinative fact. Whereas petitioner asserts that there is absolutely no testimony in the record that Hintz shot himself, the record below unequivocally demonstrates that Hintz did shoot himself. Petitioner also misstates fact in asserting that Sarrazin's vehicle could not have avoided the deputies and that there were 3 to 5 police cars serving a justice court warrant. The record indicates that Sarrazin could have avoided the deputies and that there were only two law enforcement vehicles involved in the stop.

This Court should not grant a writ of certiorari pursuant to Rule 10(c), Rev. Rules, S.Ct., because the Ninth Circuit Court of Appeals has not decided a federal question in a way that conflicts with applicable decisions of this Court. Neither the district court nor the court of appeals has annunciated a standard for summary judgment different from the standards set forth in decisions of this Court. The petitioner's claim that summary judgment was not appropriate under the facts of this case does not give rise to a federal question.

Ultimately, summary judgment was appropriate in this case because of the absence of a genuine issue of

material fact. There is no evidence in the record to support petitioner's claim that one of the law enforcement officers shot Hintz. Hintz shot himself. There is no presumption against suicide applicable in Section 1983 actions which would create an issue of fact. There is no evidence in the record to support petitioner's claim that Hintz was in custody when he shot himself. Hintz was in a moving vehicle with an avenue of escape at the moment he shot himself.

This Court should not grant a writ of certiorari pursuant to Rule 10(a), Rev. Rules, S.Ct., because the district court's grant of summary judgment, based upon a fair assessment of the record, is not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Given that summary judgment was properly entered on the federal claims, the district court did not abuse its discretion in dismissing Hintz's pendent state law claims.

ARGUMENT

I. Petitioner Misstates Facts Critical To This Court's Consideration Of The Petition.

Petitioner contends that "there is absolutely no testimony in the record that Hintz shot himself." (Petition, p. 9). To the contrary, all of the witnesses, including Wade Sarrazin, said that John Hintz shot himself. The district court's careful consideration of the record revealed:

> [P]laintiff was not present at the time of Hintz' death. All of the witnesses who were present have disputed plaintiff's theory that one of the

> defendants intentionally shot Hintz. Most significantly, Wade Sarrazin, Hintz's friend and the driver of the pickup truck in which Hintz was riding, contradicts plaintiff's allegations. Sarrazin testified in his deposition that there was no real "inkling of evidence" in his mind that somebody else shot Hintz, and that there was no doubt in his mind that Hintz shot himself. This testimony was given after Sarrazin had reviewed and verified the essential accuracy of a statement given by him to authorities early in the morning of July 12, 1986, wherein he described the manner in which he saw Hintz hold the shotgun, point it at his chest, say "good-bye, Wade, I love you", and shoot himself. Sarrazin further stated that "the officers never fired their weapons."

(Pet. App. A., pp. 33-34).

Petitioner also asserts that Sarrazin's vehicle could not have avoided the deputies. (Petition, pp. 18-19). However, Hintz apparently decided to shoot himself while Sarrazin was slowing down to turn onto the dirt road. At that point, Sarrazin could have avoided the deputies by continuing to drive on the main road, or by passing them on the dirt road. Petitioner also asserts that there were three to five police cars attempting to serve a justice court warrant on Hintz. (Petition, p. 19). There were two law enforcement vehicles, one driven by Deputy Tashjian and one driven by Deputy Wilson, with Deputy Keto as a passenger.

II. Certiorari Should Not Be Granted Because The Ninth Circuit Has Not Decided A Federal Question In Conflict With This Court's Precedent.

Rule 10(c), Rev. Rules, S.Ct., indicates the character of reasons that will be considered in a review of a petition for writ of certiorari. The rule states, in relevant part, that certiorari may be granted:

> Where . . . a United States Court of Appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

Here, the petitioner cannot show a conflict between this Court's precedent and the lower court decisions. In construing the standards for granting summary judgment, this Court has held that summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

Neither the district court nor the Ninth Circuit annunciated a *standard* whereby summary judgment may be granted notwithstanding the existence of a genuine issue of material fact. Petitioner merely claims that the lower courts erred in determining that there were no genuine issues of material fact. (Petition, p. 24). Thus, it is clear that the court of appeals did not decide a federal

question in a way which conflicts with this Court's precedent. Petitioner simply seeks a second review of an adverse decision.

However, not every litigant unhappy with a district court's grant of summary judgment is entitled to a review by this Court. *See Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452, 3 L.Ed.2d 935, 945, 79 S.Ct. 921, 930 (1959) (Frankfurter, J., dissenting), wherein Justice Frankfurter, quoting Chief Justice Taft, pointed out:

> "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal."

The issues raised by petitioner are not matters of large public concern, but are matters of lesser concern, without especial general interest, set forth only because she wants to have the court of last resort pass upon her right. *Id.* at 453, 3 L.Ed.2d at 945, 79 S.Ct. at 930. As such, they are not deserving of the time and attention and energy of this Court, and the petition for certiorari should be denied.

III. The Lower Court Did Not Err In Granting Summary Judgment For Defendants On Petitioner's Section 1983 Claim.

Petitioner alleged a claim under 42 U.S.C. § 1983 for violation of the civil rights of John Hintz. Section 1983 does not create any substantive rights. Instead, Section 1983 "merely provides remedies for deprivations of rights established elsewhere." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 85 L.Ed.2d 791, 800, 105 S.Ct. 2427, 2432 (1985) (citing *Baker v. McCollan*, 443 U.S. 137, 140, 144, note 3, 61 L.Ed.2d 433, 439, 441, n. 3, 99 S.Ct. 2689, 2692, 2694, n. 3 (1979)). 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To maintain a claim under Section 1983, petitioner must show that: (1) The County and officers acted under color of state law; and (2) that their action subjected John Hintz to the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L.Ed.2d 420, 428, 101 S.Ct. 1908, 1913 (1981) (overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986)).

Petitioner alleges that the County and officers deprived John Hintz of his civil rights by causing his death, either negligently, grossly negligently, or through the unjustified use of arbitrary and excessive force. Mere negligence is not actionable under Section 1983. *Daniels v. Williams*, 474 U.S. 327, 332, 88 L.Ed.2d 662, 668, 106 S.Ct. 662, 665 (1986). Accordingly, petitioner's Section 1983 claim must rest upon the allegations that the County and officers caused John Hintz's death through gross negligence or the unjustified use of arbitrary and excessive force.

A. There Is No Presumption Against Suicide Constituting Affirmative Evidence In Federal Civil Actions.

Petitioner's Section 1983 claim, insofar as it attempts to impose liability for the unjustified use of arbitrary and excessive force, is based upon the allegation that one of the deputies, presumably Brad Wilson, shot John Hintz. However, the direct and uncontradicted evidence is that Hintz committed suicide. To avoid summary judgment, petitioner asserts the existence of a presumption against suicide which constitutes affirmative evidence creating a genuine issue of material fact as to whether Hintz committed suicide. Petitioner relies upon *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959). (Petition, pp. 23-24).

Dick does not provide authority for petitioner's assertion. In *Dick*, this Court merely recognized that under North Dakota law, a presumption that death was accidental has the weight of affirmative evidence. The

presumption arises in insurance coverage cases where death occurred by gunshot wound. This Court held that the presumption would be applied by federal courts in diversity jurisdiction actions involving North Dakota law.

North Dakota law does not apply to petitioner's Section 1983 claim. Neither federal statutory law nor federal common law recognizes a "presumption against suicide" in Section 1983 actions. There is no compelling reason for this Court to adopt such a presumption. The North Dakota presumption discussed in *Dick* applies only to insurance cases where the insurer seeks to deny or reduce its liability by asserting that the insured committed suicide.

Moreover, a presumption of accidental death would be meaningless in the present case since petitioner claims, not that Hintz accidentally shot himself, but that he was shot by law enforcement officers. Finally, the circumstances surrounding Hintz's death are not unknown or unclear. There were four witnesses to the circumstances of Hintz's death, one a friend of Hintz, who all testified that he shot himself and that he was not shot by a law enforcement officer.

There is no presumption against suicide in Section 1983 actions. The lower courts did not err in refusing to apply such a presumption, and there is no compelling reason for this Court to recognize the presumption advocated by petitioner.

B. A Passenger In A Moving Vehicle With An Avenue Of Escape Is Not In The Custody Of Law Enforcement Officers, For The Purpose Of Imposing Liability On The Officers For Failing To Prevent His Suicide.

Petitioner's Section 1983 claim, insofar as it seeks to impose liability for gross negligence, appears to be based on the officers' failure to prevent Hintz's suicide. This Court has stated that "when the state takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." *DeShaney v. Winnebago County Social Services Department*, 489 U.S. 189, 199-200, 103 L.Ed.2d 249, 261, 109 S.Ct. 998, 1005 (1989). *See also Lipscomb v. Simmons*, 884 F.2d 1242, 1246 (9th Cir. 1989) (holding that when an individual has a special relationship with the state, such as a custodial relationship, the state assumes an affirmative obligation to secure that individual's constitutional liberty). By alleging that the County and officers caused John Hintz's death through gross negligence, Hintz is apparently attempting to invoke the substantive due process protections afforded to those who have a special relationship with the state, such as a custodial relationship. Although this Court has never recognized this relationship as creating liability for failure to prevent suicide, some courts appear to have relied on this relationship in recognizing a cause of action for failure to prevent a suicide based upon willful and wanton negligence. *See Strandberg v. City of Helena*, 791 F.2d 744, 749 (9th Cir. 1986).

A determination of whether the Due Process Clause imposes an affirmative duty on the State to prevent the

suicide of those in its custody need not be made in the present case. The facts clearly illustrate that Hintz was not in the custody of the officers when he shot himself. Custody, by definition, denotes immediate physical control over a person. *Black's Law Dictionary*, p. 347 (5th Ed. 1979); *Webster's New Collegiate Dictionary*, p. 280 (1973). This Court's decisions indicate that even detainer of the person is not sufficient to render a person in custody; rather, the person's freedom of action must be curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984); *California v Beheller*, 463 U.S. 1121, 1125, 77 L.Ed.2d 1275, 1279, 103 S.Ct. 3517, 3520 (1983).

At the time of his suicide, Hintz was not incarcerated or even being held by the officers. The testimony of Sarrazin indicates that Hintz determined to shoot himself while Sarrazin's vehicle was still on the paved road. While the exact location of Sarrazin's truck at the time Hintz shot himself is not ascertainable, it is known that Sarrazin's truck was still moving, and could have continued down the dirt road past the Wilson and Keto vehicle. Accordingly, even if this Court were to recognize a cause of action under Section 1983 for failure to prevent the suicide of a person in the custody of the state, the facts do not support such a cause of action in this case.

Petitioner argues, without supporting authority, and contrary to the facts, that when a person has no avenue of escape from law enforcement officials, the person, even if in a moving vehicle, is "in custody", and liability may be imposed under Section 1983 for failure to prevent his suicide. The court of appeals' rejection of this argument made good sense and good policy. The officers had no

control over Hintz or his actions when he committed suicide. They could not have prevented his suicide. They had not yet had a chance to relieve Hintz of his gun or any other possible instrument of suicide. It would serve no purpose to impose liability upon law enforcement officers for failing to prevent an action when it was not within their power to do so.

IV. The District Court's Grant Of Summary Judgment Was Not Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In granting summary judgment, the district court declined petitioner's request to create new legal principles. To avoid summary judgment, petitioner would have had the district court adopt a presumption against suicide recognized by some states in insurance coverage actions and apply it to all federal civil actions. She also would have had the district court expand the meaning of the term "in custody" to include persons who may shortly be detained but still retain almost unlimited personal freedom of action. The district court's refusal to recognize the new legal principles propounded by petitioner was not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision pursuant to Rule 10(a), Rev. Rules, S.Ct.

V. The Appellate Court Properly Affirmed The District Court's Denial Of Petitioner's Pendent State Claims.

Petitioner has presented the question of whether the appellate court misapplied *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966), in ruling that the trial court had the discretion to dismiss all claims. (Petition, p. iii). The district court held:

> [S]ince the federal claims are resolved prior to trial, this Court has a "powerful reason" to decline to exercise jurisdiction over the plaintiff's pendent state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 619 (1988). The Court finds that dismissal of the pendent claims is appropriate here, after consideration of the relevant factors. *Carnegie-Mellon*, 108 S.Ct. at 619 n.7.

As the appellate court recognized, the district court properly exercised its discretion pursuant to this Court's precedent in dismissing the pendent claims. In the absence of a more specific objection to the district court's dismissal of the claims, this Court should decline to review this issue.

CONCLUSION

For the reasons presented above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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